Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

HERMAN FIELDS,

Petitioner,

v.

POOL COMPANY, incorrectly sued as Pool Offshore, Inc.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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484

QUESTIONS PRESENTED FOR REVIEW

1. Considering the nature, use, and intended use of the NEPTUNE SPAR, whether this hybrid is a vessel for Jones Act purposes.

2. Removal of the case from State Court was erroneous in that the "saving to suitors" clause allows for the Plaintiff to have the issue of seaman status tried in State Court.

PARTIES TO THE PROCEEDING

Petitioners

Herman Fields is an individual and a person of the full age of majority and resident of the State of Louisiana. The petitioner is not a corporation.

Respondents

Oryx Energy Company and Pool Company.

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceeding ii

Table of Contents iii

Table of Authorities iv

Opinions Below 1

Jurisdictional Statement 1

Constitutional and Statutory Provisions Involved 1

Statement of the Case 5

Arguments for Granting Writ 7

Argument I 7

Argument II 15

Conclusion 18

Appendix

Appendix A
United States Fifth Circuit Court of Appeals
Opinion, 7/27/99 . . . . . 1a

Appendix B
District Court for the Eastern District
of Louisiana Order 12/8/97 . . . . . 17a

TABLE OF AUTHORITIES

Cases: Page

Addison v. Gulf Coast Contracting Servs., Inc.,
744 F.2d 494 (5th Cir. 1984) 6

B., Inc. v. Miller Brewing Company,
663 F.2d 545 (5th Cir. 1981) 16

Brunet v. Boh Bros. Constr. Co., Inc.,
715 F.2d 196 (5th Cir. 1983) 10, 13

Burchett v. Cargill, Inc.,
48 F.3d 173 (5th Cir. 1995),
rehearing and suggestion for rehearing
en banc denied, 55 F.3d 634 (5th Cir. 1995) . . . 12

Chandris, Inc. v. Latsis,
515 U.S. 347, 115 S.Ct. 2172 (1995) 8, 11

Cook v. Belden Concrete Prods.,
472 F.2d 999 (5th Cir. 1973) 10, 13

Eastern S.S. Corp. v. Great Lakes Dredge & Dock Co.,
256 F. 467 (1st Cir. 1919) 14

Green v. Amerada Hess Corp.,
707 F.2d 201 (5th Cir. 1983) 16

Gremillon v. Gulf Coast Catering Co.,
904 F.2d 290 (5th Cir. 1990) 11

Iwag v. Geisel Compania Maritima,
882 F.Supp. 597 (S.D. Tx. 1995) 16

Harbor Tug & Barge Co. v. Papai,
520 U.S. 548, 117 S.Ct. 1535 (1997) 11

In re P. Sanford Ross, Inc.,
196 F. 921 (E.D.N.Y. 1912),
rev'd on other grounds,
204 F. 248 (2nd Cir. 1913) 14

Kattelman v. Otis Engineering Corp.,
701 F.Supp. 560 (E.D. La. 1988) 16

Lackey v. Atlantic Richfield Co.,
990 F.2d 202 (5th Cir. 1993),
rehearing denied, 995 F.2d 225
(5th Cir. 1993) 6

Lirette v. N.L. Sperry Sun, Inc.,
820 F.2d 116 (5th Cir. 1987). 6

Lonthier v. Northwest Ins. Co.,
599 F.Supp. 963 (W.D. La. 1985). 15, 16

Manuel v. P.A.W. Drilling & Well Service, Inc.,
135 F.3d 344 (5th Cir. 1998) 7, 8, 9, 12, 13

Matter of SEDCO, Inc,
543 F.Supp. 561 (S.D. Tex. 1982) 14

Offshore Co. v. Robison,
266 F.2d 769 (1959) 7,9, 13, 14

Pierpoint v. Barnes,
94 F.3d 813,(2D Cir. 1996)
certiorari denied , 117 S.Ct. 1691,
520 U.S. 1209 15

Producers Drilling Co. v. Gray,
361 F.2d 432 (5th Cir. 1966) 9, 13

The Sunbeam,
195 F. 468 (2nd Cir. 1912) 14

Yawn v. Southern Ry. Co.,
591 F.2d 312 (5th Cir. 1979),
cert. denied, 442 U.S. 934,
995 S.Ct. 2869 (1979) 16

Statutes: **Page**

28 U.S.C. § 1333 (1) 1, 5, 15

28 U.S.C. § 1445 (a) 2, 5

46 U.S.C. § 688 (a) 2, 5, 7, 14

28 U.S.C. § 1254 (1) 1

28 U.S.C. § 2106 1

46 U.S.C. §§ 183-185 13

Judiciary Act of 1789,
1st Cong., 1st Sess., Sept. 24, 1779, 1 Stat. 76 § 9 15

Other Authorities: **Page**

Campion Walsh, Oryx, CNG To Use Novel Platform in Gulf on $300 Million Project, The Oil Daily, November 10, 1994, 1994 WL 12782282 12

Churchill H.D. Hooff, Manuel v. P.A.W. Drilling & Well Service, Inc.: Special Purpose Drilling Barges and Jones Act Vessel Status, 73 Tul. L. Rev. 2155 (1999) 8, 9

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 182 F.3d 353 (5th Cir. 1999). A copy of the opinion is included in the Appendix at Appendix A at 1a. The Opinion of the District Court for the Eastern District Of Louisiana is published at 1998 WL 128980 (E.D.L.A. 1998) and is included in Appendix B at 17a.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its Opinion on July 27, 1999. This Petition for Writ of Certiorari is filed within 90 days of the Judgment of the Fifth Circuit Court of Appeals. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254 (1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Saving to Suitors Clause
28 U.S.C. § 1333 (1)

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.
>
> (2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

****

Non-Removable Actions
28 U.S.C § 1445 (a)

(a) A civil action in any State court against a railroad or its receivers or trustees, arising under sections 1-4 and 5-10 of the Act of April 22, 1908 (45 U.S.C. 51-54, 55-60), may not be removed to any district court of the United States.

(b) A civil action in any State court against a carrier or its receivers or trustees to recover damages for delay, loss, or injury of shipments, arising under section 11706 or 14706 of title 49, may not be removed to any district court of the United States unless the matter in controversy exceeds $10,000, exclusive of interest and costs.

(c) A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States.

(d) A civil action in any State court arising under section 40302 of the Violence Against Women Act of 1994 may not be removed to any district court of the United States.

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The Jones Act
46 U.S.C. § 688

§ 688. Recovery for injury to or death of seaman

(a) Application of railway employee statutes; jurisdiction

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

(b) Limitation for certain aliens; applicability in lieu of other remedy

> (1) No action may be maintained under subsection (a) of this section or under any other maritime law of the United States for maintenance and cure or for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action if the incident occurred--
>
> > (A) while that person was in the employ of an enterprise engaged in the exploration, development, or

production of off-shore mineral or energy resources--including but not limited to drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, constructing, or transporting supplies, equipment or personnel, but not including transporting those resources by a vessel constructed or adapted primarily to carry oil in bulk in the cargo spaces; and

(B) in the territorial waters or waters overlaying the continental shelf of a nation other than the United States, its territories, or possessions. As used in this paragraph, the term "continental shelf" has the meaning stated in article I of the 1958 Convention on the Continental Shelf.

(2) The provisions of paragraph (1) of this subsection shall not be applicable if the person bringing the action establishes that no remedy was available to that person–

(A) under the laws of the nation asserting jurisdiction over the area in which the incident occurred; or

(B) under the laws of the nation in which, at the time of the incident, the person for whose injury or death a remedy is sought maintained citizenship or residency.

STATEMENT OF THE CASE

On or about February 20, 1997, Petitioner was employed as a roughneck/derrickhand and as a member of the crew of Rig 10/NEPTUNE SPAR, in such a manner as to contribute to the overall intended purpose of said rig while in navigation in the Gulf of Mexico. The rig is a Mobile Offshore Drilling Unit (MODU) operating in the deepwater Gulf of Mexico. During the course and scope of his employment as a roughneck/derrickhand on the aforementioned date, the bushings aboard the MODU stuck. As a result, the driller exerted an extreme amount of force with the electric hoist resulting in the bushings being pulled violently from the rotary, striking Mr. Fields in the face and head. As a consequence of this accident, Mr. Fields sustained multiple fractures to his face, injuries to the central nervous system, and injuries to his brain, all resulting in his permanent disability.

On August 27, 1997, Petitioner filed a Seaman's Complaint in the Civil District Court for the Parish of Orleans, State of Louisiana, bearing the title "*Herman Fields v. Pool Offshore, Inc. et al,*", Civil District Court No. 97-15159, Div. F, Sec. 10. Petitioner named as Respondents Pool Offshore, Inc., and Oryx Energy Company, (hereinafter, collectively, "Respondent").

Petitioner invoked Louisiana State Court jurisdiction over his Jones Act claim under 46 U.S.C. § 688, commonly known as the Jones Act, and 28 U.S.C. § 1333 (1), otherwise known as the "Saving to Suitors" clause, with surrogate application of the General Maritime Law. Petitioner's Seaman's Complaint clearly and sincerely established the existence of a Jones Act claim, which may not be removed to Federal Court. 46 U.S.C. § 688; 28 U.S.C. § 1445(a);

Lackey v. Atlantic Richfield Co., 990 F.2d 202, 207 (5th Cir. 1993), rehearing denied, 995 F.2d 225 (5th Cir. 1993); Lirette v. N.L. Sperry Sun, Inc., 820 F.2d 116, 117 (5th Cir. 1987); Addison v. Gulf Coast Contracting Servs., Inc., 744 F.2d 494, 498 (5th Cir. 1984). On October 8, 1997, Respondents filed a Notice of Removal, seeking to have this Jones Act case removed to Federal Court. Thereafter, on November 8, 1997, Petitioner filed a timely Notice of Remand, arguing the status of the NEPTUNE SPAR required state court adjudication. The Respondents then filed an opposition to Petitioner's Motion to Remand. Before Petitioner was given an opportunity to respond in writing or orally, by Petitioner's formal Motion for Leave to File Response to Defendant's Opposition to Remand, the District Court denied Petitioner's Motion to Remand by Order and Reasons dated December 8, 1997. Subsequently, on December 16, 1997, the Respondents filed a Motion for Summary Judgment, stating that Mr. Fields had no cause of action against them under the Jones Act because the NEPTUNE SPAR was not a vessel. Petitioner opposed that Motion for Summary Judgment on January 7, 1998, stating that genuine issues of material fact existed as to Petitioner's status as a Jones Act seaman and the vessel status of the NEPTUNE SPAR, and because of those issues, summary judgment should not be granted as a matter of law. By Order and Reasons dated February 3, 1998, the District Court granted Respondent's Motion for Summary Judgment. The District Court also denied Petitioner's Motion for Leave to Supplement the Record. On March 20, 1998, United States District Court Judge for the Eastern District of Louisiana, Edith Brown Clement, below dismissed Petitioner's complaint against Respondent. As a result, Appeal was taken on March 27, 1998 in the Fifth Circuit Court of Appeals. Oral Arguments took place on April 6, 1999 before Fifth Circuit Court of Appeal Judges Garwood, Barksdale, and Benavides.

In an opinion dated July 27, 1999, Judge Garwood affirmed the District Court's judgment, holding that the NEPTUNE SPAR was not a vessel for Jones Act purposes and that the nmatter was properly removed from State Court.

ARGUMENT FOR GRANTING WRIT

ARGUMENT I:

The NEPTUNE SPAR is a vessel for Jones Act purposes.

"[. . .] a brave vessel, who had no doubt some noble creatures in her."

-William Shakespeare, The Tempest act 1, sc.1.

"Once more unto the breach, dear friends once more."

-William Shakespeare, King Henry the Fifth act 3, sc.1.

"[. . .] [a]ttempts to fix unvarying meanings [having] a firm legal significance to such terms as "seaman," "vessel," "member[s] of the crew," must come to grief on the facts. These terms have such a wide range of meaning under the Jones Act as interpreted in the courts, that, except in rare cases, only a jury or trier of facts can determine their application in the circumstances of a particular case."

- Offshore Co. v. Robison, 266 F.2d 769, 779 (5th Cir.1959).

The Jones Act, 46 U.S.C. § 688 (West 1999), like the shores of our Nation, is forever being sculpted by the action of wind, wave and the ingenuity of mankind. Central to the Jones Act's applicability is the presence of a "vessel."

Chandris, Inc. v. Latsis, 515 U.S. 347 (1995) (hereinafter "Latsis"). Central to this application for writ of certiorari is the hypothesis that the NEPTUNE SPAR, a bobbing cone of massive size and technological achievement, is a Jones Act vessel. The NEPTUNE SPAR is not a vessel in the superficial sense, but as the next step in the evolutionary continuum which saw its genesis in Louisiana in the early 1950's as entrepreneurs and laborers took their first furtive steps back to the sea in search of the oil and gas secreted in progressively deeper and deeper water.

Throughout this evolution, the judicial system, in particular the United States Court of Appeals for the Fifth Circuit, has followed in equally progressive steps towards classifying the machines sent down to sea to extract offshore mineral resources. See, e.g., Manuel v. P.A.W. Drilling & Well Service, Inc., 135 F.3d 344 (5th Cir. 1998) (hereinafter "Manuel"). Rather than establish a multi-factored test, or designate a *sina qua non*, Courts have instead provided waypoints so that Judges may freely navigate through the evidence and either find a particular craft to be a vessel or just another work platform, beyond the pale of Jones Act coverage. See, generally, Latsis; Churchill H.D. Hooff, Manuel v. P.A.W. Drilling & Well Service, Inc.: Special Purpose Drilling Barges and Jones Act Vessel Status, 73 Tul. L. Rev. 2155 (1999) (hereinafter "Hooff"). Petitioner respectfully submits the following brief historical case review from the United States Fifth Circuit Court of Appeals to demonstrate not only that the NEPTUNE SPAR is a Jones Act vessel, but that the Fifth Circuit deviated from its own prior jurisprudence and thrown those who face the perils of the blue water seas from the coverage and comfort of seaman status.

Because the Jones Act does not specifically define what a vessel is, and because this Honorable Supreme Court

has not yet "[. . .] squarely addressed the issue of vessel status [. . .]," Hooff at 2156, judicial interpretation must keep pace with technology while keeping its historical precedent in mind. The history of decisions involving special purpose drilling structures may be traced to Offshore Co. v. Robison, 266 F.2d 769 (5th Cir. 1959). In 1959, the Fifth Circuit in Robison held that a drilling rig, mounted on a drilling barge, was a vessel for Jones Act purposes. Id, at 779-80. The subject-matter structure had a raked bow, navigation lights, and crew's quarters, but had no independent means of propulsion. Id, at 781. Nevertheless, "Judge Wisdom recognized that all the workers on these unconventional vessels were exposed to the usual marine risks and the risk of the 'top-heavy drilling barges collapsing.'" Hooff, at 2157. Never before had such an anomalous structure been considered a vessel for Jones Act purposes.

In 1966, the Fifth Circuit, in Producers Drilling Co. v. Gray, 361 F.2d 432 (5th Cir. 1966), noted that the plaintiff worker in question was injured while working on a submersible drilling barge, equipped with drilling supplies and equipment, and towed from one location to another. The Fifth Circuit went on to note that once the barge was at the drilling site, it was submerged to the bottom of the water. Id. Once at the bottom, the barge commenced its drilling operations, and finally was refloated and relocated to another venue or location once the operation was complete. Id. Subsequently, the Court concluded that the special purpose structure was indeed a vessel for Jones Act purposes. Id. Very recently, the Fifth Circuit reconsidered and ratified its prior Producers Drilling Co. opinion, specifically stating that: "[s]ince Producers Drilling, this Court has generally held that special purpose drilling craft are vessels as a matter of law." Manuel, 135 F.3d at 348.

Last, Petitioner submits the 1983 decision of Brunet v. Boh Bros. Constr. Co., Inc., 715 F.2d 196 (5th Cir. 1983) (hereinafter "Brunet"). The issue before the Fifth Circuit was whether or not a barge, consisting of several interlocking flexi-float platforms that carried a pile-driving crane, was a vessel under the Jones Act. Id., 715 F.2d at 197. The facts revealed that the barge was moored to pilings by way of cables at the time of the plaintiff's injury. Id. The Brunet Court determined that "[. . .] the barge was designed both to support the crane and to transport it on a fairly regular basis [. . .]." Id. at 199. Although the barge had been anchored in one place for some months, this finding was not anathema to the ultimate determination that "[the barge] was designed for the transportation of equipment over navigable waters." Id. (citing Cook v. Belden Concrete Products, Inc., 472 F.2d 999, 1001 (5th Cir. 1973)).

The Court, in concluding its analysis of the three preceding cases, stated:

> The above cases are typical of the numerous "special purpose vessel" cases this Circuit has decided. They exhibit a common theme: Despite the outward appearance of the structure at issue, if a primary purpose of the craft is to transport passengers, cargo, or equipment from place to place across navigable waters, then the structure is a vessel. In the special purpose craft cases, particularly the drilling barge cases, the transportation function of the structure was more than merely incidental to its purpose. Each craft was used as a work platform when its crew drilled for oil and gas. However, before the crew could drill, the barge was used to transport its

specialized drilling equipment over water to the drilling site. Manuel, 135 F.3d at 348, 349.

In order to qualify as a Jones Act seaman, this Honorable Supreme Court has held that a putative seaman must "[. . .] contribute to the function [of a vessel] or to the accomplishment of its mission [. . .] and must have a connection to a vessel in navigation (or an identifiable group of vessels) that is substantial in both its duration and nature." Latsis, 515 U.S. 347, 115 S.Ct. 2172, 2179 (1995); Harbor Tug & Barge Co. v. Papai, 117 S.Ct. 1535, 520 U.S. 548 (1997). The central issue giving rise to this application for writ of certiorari is the status of the NEPTUNE SPAR at the time of the accident. The NEPTUNE SPAR, a special purpose drilling craft, was and is a vessel for Jones Act purposes. The remaining qualifications for Jones Act seaman status are seemingly not in dispute. Those questions were not part of the District Court's decision and are assumed to exist for purposes of this application for writ of certiorari.

Respondent respectfully submits that the NEPTUNE SPAR is a vessel for Jones Act purposes. The Fifth Circuit has provided indicia of vessel status, i.e. the presence of certain features aboard a particular structure or characteristics of its design, which the Court employs as "[. . .] useful guides [. . .]" in analyzing vessel status. Manuel, 135 F.3d at 352 (citing Gremillon v. Gulf Coast Catering Co., 904 F.2d 290, 294 (5th Cir. 1990)). These factors are: 1) the intention of the owner to move the structure on a regular basis; 2) the ability of the submerged structure to be relocated; 3) the length of time the structure has remained stationary; 4) the presence of navigational aids; 5) the presence of a raked bow; 6) the presence of lifeboats and other life-saving equipment; 7) the presence of bilge pumps;

8) the presence of crew quarters; and 9) the registration of the structure as a vessel with the Coast Guard. See, e.g., Burchett v. Cargill, Inc., 48 F.3d 173 (5th Cir. 1995), rehearing and suggestion for rehearing *en banc* denied, 55 F.3d 634 (5th Cir. 1995); Johnson v. Odeco Oil and Gas Co., 864 F.2d 40, at 43 (5th Cir. 1989).

Despite outward appearances, the NEPTUNE SPAR is a vessel. There is total freedom of the vessel from the actual seabed. Anchored to pilings attached to the sea floor, much like a vessel is anchored, the NEPTUNE SPAR is exposed to the hazards of the sea. This tethering mechanism allows it to bob, rock, and sway according to the seas, subjecting all of her crew to the hazards of the sea. Like the special purpose drilling structures discussed in Manuel, 135 F.3d at 348-249, the vessel was specifically designed and constructed as a mobile drilling unit, capable of anchoring at different sites and drilling on demand. Last, the transportation function of the NEPTUNE SPAR is not merely incidental, but the driving force behind the creation and design of such a unique structure. Campion Walsh, Oryx, CNG To Use Novel Platform in Gulf on $300 Million Project, The Oil Daily, November 10, 1994, 1994 WL 12782282.

The NEPTUNE SPAR is used as a platform to drill for oil and gas, but before drilling is available, the NEPTUNE SPAR serves as a transport for the highly specialized drilling equipment and crew required to conduct deepwater drilling in the Gulf of Mexico. The intention of Oryx and CNG was to have a less expensive, more flexible, and readily movable system for oil production in the deepwater Gulf of Mexico, capable of drilling at different locales and venues. Campion Walsh, Oryx, CNG To Use Novel Platform in Gulf on $300 Million Project, The Oil Daily, November 10, 1994, 1994

WL 12782282. A mere lack of sailing, as alleged by the Respondent, should not take away from its potential to be relocated at any time and capable of setting up shop anywhere in the Gulf of Mexico. Finally, the NEPTUNE SPAR has two self-launching lifeboats, bilge pumps, and crew quarters.

In Manuel, the Fifth Circuit noted that certain "special purpose structures far removed from the conventional notion of ships and seagoing barges" may in fact be vessels for Jones Act purposes. Id. at 348. "Unconventional craft [such] as submersible drilling barges and floating dredges which are designed for navigation and commerce are vessels within general maritime and Jones Act jurisdiction and retain such status even while moored, dry-docked, or otherwise immobilized and secured to land." Id.; Cook v. Belden Concrete Prods., 472 F.2d 999, 1002 (5th Cir. 1973).

Clearly, the NEPTUNE SPAR is a "special purpose structure", much like the vessels in Robison, Producers Drilling, Brunet, and Manuel. "These drilling rigs and other special purpose craft do more than merely float on navigable waters and serve as work platforms. Instead, an important part of their function includes transporting passengers, cargo, or equipment across navigable waters." Manuel, 135 F.3d at 348 - 351. The NEPTUNE SPAR was designed for many purposes, of which transportation is not merely incidental.

Finally, Petitioner questions whether or not, if the NEPTUNE SPAR had been involved in a maritime collision, Respondents would have been so quick to claim their "vessel" free of navigable capacity. Specifically, under the Limitation of Liability Act, 46 U.S.C. §§ 183-89 (West 1999), the NEPTUNE SPAR seems to qualify as a vessel which would allow its owners to limit their liability pursuant to the aforementioned act. At least one court has held that to be a

"vessel" for limitation purposes, the craft must "[. . .] be built with the intent that it be used in navigation as a means of transportation; [. . .] [it] must not be permanently [secured]; and [. . .] [it] must be subject to the perils of the sea." See, Matter of SEDCO, Inc, 543 F.Supp. 561, 571 (S.D. Tex. 1982). The United States District Court for the Southern District of Texas noted numerous decisions where special purpose craft similar to the NEPTUNE SPAR were held to be vessels under 46 U.S.C. §§ 183-89. SEDCO, Inc., 543 F.Supp. at 571 (citing In re P. Sanford Ross, Inc., 196 F. 921 (E.D.N.Y. 1912), rev'd on other grounds, 204 F. 248 (2nd Cir. 1913); The Sunbeam, 195 F. 468 (2nd Cir. 1912); and Eastern S.S. Corp. v. Great Lakes Dredge & Dock Co., 256 F. 467 (1st Cir. 1919)).

This Honorable Court must be called upon to take an historical step toward the continuing evolution of the development of vessel status law. In 1959, the Robison decision carried Jones Act jurisprudence into the sphere of petrochemical exploitation, where vessel status could no longer be based on simple "if it looks like a vessel, it must be a vessel" reasoning. The United States Court of Appeals for the Fifth Circuit has strayed from its historical role of placing special purpose structures before a jury of the putative seaman's peers and Petitioner respectfully prays that this Honorable Supreme Court use its mandate to correct the error and preserve for those who go down to the sea all the protections to which they are entitled under 46 U.S.C. § 688(a).

ARGUMENT II

Common law maritime cases filed in state court are not removable to federal court under the "saving to suitors" clause which preserves plaintiff's right to state court forum in cases arising under common law of the sea. Pierpoint v. Barnes, 94 F.3d 813,(2D Cir. 1996), certiorari denied , 117 S.Ct. 1691, 520 U.S. 1209, 137 L.Ed.2d 818.

The "savings to suitors clause," 28 U.S.C. § 1333 (1) (West 1999), allows a plaintiff to file his or her maritime cause of action in state court. The "savings to suitors" clause can trace its roots to Section Nine of the Judiciary Act of 1789, 1st Cong., 1st Sess., Sept. 24, 1779, 1 Stat. 76 § 9. This Nation's earliest legislators recognized the sanctity of the common law and of the rights of the States to hear causes of action not exclusively granted to the District Courts of the United States. By machination and manipulation, Respondents have absconded with Petitioner's right to be heard in Louisiana state court. The Fifth Circuit Court of Appeals incorrectly ratified the circular logic which allowed it happen: because the NEPTUNE SPAR is not a Jones Act vessel, the Honorable Fifth Circuit reasoned, Respondents' removal of Petitioner's claim to federal court was proper. Thus, because of the novelty of the craft, the vessel status issue properly put before a jury was instead decided on Motion for Summary Judgment in federal court.

In order to prevail over a Motion to Remand where vessel status is at issue, a Jones Act defendant must prove that the allegation of Jones Act status was fraudulent. The mere assertion by the Respondents that the Petitioner is not a Jones Act Seaman because of the status of the subject vessel Seaman cannot overcome the Motion to Remand when the complaint states a claim under the Jones Act. Lonthier v. Northwest

Ins. Co., 599 F.Supp. 963, 965 (W.D. La. 1985). "The burden of proving that the allegations were made fraudulently falls on the Respondents, and *any doubts should be resolved in favor of the plaintiffs*." Id.; Yawn v. Southern Ry. Co., 591 F.2d 312, 316-317 (5th Cir. 1979), cert. denied, 442 U.S. 934, 995 S.Ct. 2869, 61 L.Ed.2d 304 (1979); Kattelman v. Otis Engineering Corp., 701 F.Supp. 560 (E.D. La. 1988) (emphasis added).

Prior to Petitioner's claim, the Fifth Circuit went further than the above admonition by holding that District Courts should not "pre-try" substantive factual issues in order to make a preliminary determination as to the existence of subject matter jurisdiction on removal. Green v. Amerada Hess Corp., 707 F.2d 201, 204-205 (5th Cir. 1983); B., Inc. v. Miller Brewing Company, 663 F.2d 545, 546, 550-51 (5th Cir. 1981); Lonthier, 599 F.Supp. at 965; Kattelman, 701 F.Supp. at 566. The question of seaman status is at the heart of, and constitutes the soul, of Petitioner's claims against Respondents. The District Court and the Fifth Circuit should have resolved this disputed question of fact from the pleadings and affidavits in favor of Petitioner. Yawn, 591 F.2d at 316; Iwag v. Geisel Compania Maritima, 882 F.Supp. 597 (S.D. Tx. 1995).

Finally, the ultimate issues surrounding Mr. Fields' status as a Jones Act Seaman, and hence the status of the vessel the NEPTUNE SPAR, must be left to the State Court from which this case was improperly removed. In essence, the District Court's determinative power was to merely ascertain, based on the pleadings and supporting affidavits of the Petitioner, whether on its face, joinder of the Jones Act claim was sound, making no determinations into substantive matters, which must be left to the State Court to be determined by a jury of Mr. Fields' peers.

CONCLUSION

The lower courts which considered Petitioner's claims committed manifest legal error in granting Respondents' Motions for Summary Judgment. The Petitioner, Herman Fields, respectfully prays that this Honorable Supreme Court take this cause for review and address the actions taken by the lower courts. Petitioner's right to bring his claims before a jury of his peers in state court, as established since this Nation's infancy, have been abrogated by an improper and hurried analysis of vessel status in his Jones Act cause of action. Whether or not the NEPTUNE SPAR is a vessel for purposes of the Jones Act should be decided by a jury, where there is a question as to its status. The import of the lower courts' decisions will be felt by the future generations of the men and women who go down to the sea in vessels, be those vessels traditional sailing craft or those whose construction is influenced by the hazards of petroleum exploration and of the sea itself.

Respectfully submitted:

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Filed July 27, 1999]

No. 98-30309

HERMAN FIELDS,
Plaintiff-Appellant,

v.

POOL OFFSHORE, INC., et al.,
Defendants,

POOL COMPANY, incorrectly sued as Pool Offshore, Inc.,
Defendant-Appellee.

OPINION

Appeal from the United States District Court for the Eastern District of Louisiana

Before GARWOOD, BARKSDALE and BENAVIDES, Circuit Judges. GARWOOD, Circuit Judge:

Plaintiff-appellant Herman Fields (Fields) brought a seaman's complaint for damages in state court, alleging negligence under the Jones Act, 46 U.S.C. § 688, and the general maritime law. Defendants-appellees Pool Company (Pool) and Oryx Energy Company (Oryx) (collectively defendants) removed the case to federal court. Fields' motion to remand was denied, and the district court granted summary judgment on behalf of Pool (but not Oryx). This partial summary judgment was then certified under Rule 54(b) and Fields appealed. We affirm.

Facts and Proceedings Below

A spar is a nautical structure designed to float with the bulk of the hull below the waves--something akin to a giant buoy. As United States petroleum resources have dwindled, innovative production companies have attempted to exploit oil and gas resources in deeper ocean waters. In an attempt to economically extract petroleum from one of its deep water fields--located in the Visosca Knoll area of the outer continental shelf about one hundred miles off the Alabama coast--Oryx decided to design a production platform based around a spar. Oryx's Neptune Spar--which is apparently the first structure of its kind to be deployed off of our coast--consists of a cylinder with a diameter of seventy-two feet, and a length of seven hundred five feet. The section that pokes above the surface has a production deck attached to it and contains crew quarters, bilge pumps, life boats, and production facilities.

The Neptune Spar was installed at its current location in the Visosca Knoll area in September 1996. The Neptune Spar is anchored above the field's seven well heads by six chain wire lines which connect to six pilings driven one hundred eighty feet into the seabed. In addition, the structure is further fixed in place by the network of pipes used to extract and transfer the petroleum. A casing riser extends from each of the seven well-heads to the spar, and two pipelines transport the spar's product away from the location. The Neptune Spar has no organic means of propulsion. By tightening and slackening the six chains, the spar can be maneuvered to position it closer to a particular well-head, but such movement is only possible within a two hundred fifty foot range. According to affidavits in the record, this is the Neptune Spar's initial location and it will remain thus fixed in place there until the petroleum resources beneath it are exhausted, an event that is not predicted to occur for at least fifteen years.

Fields was an employee of Pool who worked as a roughneck/derrickhand on Pool's platform drilling "rigs." These rigs are packages of drilling equipment that are moved from location to location as needed. Fields was permanently assigned to rig no. 908, but when that rig was taken out of service he was assigned to rig no. 10. Oryx contracted for the services of rig no. 10, and arranged for its transport to the Neptune Spar. On February 20, 1997, while working on this rig aboard the Neptune Spar, a section of the rig unexpectedly struck Fields in the head. This accident allegedly caused "serious and permanent injuries to" Fields' "face, central nervous system and brain . . resulting in his permanent disability." Fields is a citizen of Mississippi; Pool is a Texas corporation with its principal place of business in Texas; Oryx

is a Delaware corporation with its principal place of business in Texas.

On August 27, 1997, Fields filed the instant seaman's complaint in Louisiana state court, alleging negligence and invoking the Jones Act and the general maritime law. On October 8, 1997, the defendants filed a notice of removal on the basis of diversity of citizenship and, alternatively, under the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1331 *et seq.* They alleged that Fields' Jones Act claim was fraudulently pled to defeat removal jurisdiction in that Fields was not a Jones Act seaman and had no substantial connection to any vessel and the Neptune Spar was a fixed platform, not a vessel. On November 8, 1997, Fields filed a motion to remand, arguing that removal was precluded by the Jones Act, that Fields was a seaman and that the Jones Act claim had not been fraudulently pled. *See* 28 U.S.C. § 1445(a). Defendants filed an opposition to the motion on November 25, 1997, and, in an order dated December 5, 1997, the district court rejected Fields' motion to remand, holding that as a matter of law the Jones Act claim was baseless as Fields was not a seaman and the Neptune Spar was a fixed platform, not a vessel. On that same day, Fields filed a motion requesting fifteen days' leave to respond to defendants' response to Fields' motion to remand. This motion was dismissed as moot. On December 16, 1997, Pool moved for summary judgment, arguing that, since Fields was Pool's employee and was not a Jones Act seaman and the Neptune Spar was a fixed platform on the outer continental shelf, OCSLA, 43 U.S.C. § 1333(b), limited Fields' remedies against Pool to compensation under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 905. Oryx did not join in the motion. Fields responded by

claiming that material facts were in dispute regarding the Neptune Spar's potential vessel status and also moving for a new trial and/or rehearing of the court's prior determination that the Neptune Spar was not a vessel as a matter of law. On February 3, 1998, the district court granted summary judgment in favor of Pool and denied Fields' motion for new trial or rehearing. Fields moved for Rule 54(b) judgment on the grant of summary judgment. The court granted the Rule 54(b) motion, and this appeal followed.

Discussion

Neither below nor on appeal has Fields questioned the removal on any basis other than that it is assertedly precluded by the presence of his Jones Act claim. It appears that the diversity of citizenship and amount in controversy requirements of 28 U.S.C. § 1332(a) are met, and Fields has never contended otherwise. Hence, as no defendant is a citizen of the state in which the suit was filed, removal on the basis of diversity was proper under 28 U.S.C. § 1441(a) & (b) if not barred by the Jones Act claim. Moreover, if the Jones Act did not preclude removal, it is also clear that it would have been proper because of OCSLA, as the district court held. *Tennessee Gas Pipeline v. Houston Casualty Insurance Co.*, 87 F.3d 150, 154-56 (5th Cir. 1996).[1]

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[1] While Fields' general maritime law claim, brought in state court under the savings to suitors clause, 28 U.S.C. § 1331(1), is not one which "arise[s] under the Constitution, treaties, or laws of the United States" for purposes of 28 U.S.C. § 1331 and does not of itself furnish a basis for removal even though it could have been filed originally in federal court, nevertheless this does not preclude removal when there is some basis for original

It is settled that as a general rule Jones Act cases are not removable. *Burchette v. Cargill*, 48 F.3d 173, 175 (5th Cir. 1995). The Jones Act, 46 App. U.S.C. § 688, incorporates general provisions of the Federal Employers' Liability Act, and the latter expressly bars removal of suits thereunder. 28 U.S.C. § 1445(a). However, a fraudulently pleaded Jones Act claim does not bar removal. *Burchette*, 48 F.3d at 175 (" 'defendants may pierce the pleadings to show that the Jones Act claim has been fraudulently pleaded to prevent removal' ", quoting *Lackey v. Atlantic Richfield Co.*, 990 F.2d 202, 207 (5th Cir. 1993)). "While we have cautioned against pretrying a case to determine removal jurisdiction," the district court is authorized "to use a summary judgment-like procedure for disposing of fraudulent pleading claims." *Burchette*, 48 F.3d at 176. The court may deny remand where, but only where, it determines, after resolving "all disputed questions of fact and any ambiguities in the current controlling substantive law in plaintiff's favor," that there is " 'no reasonable basis for predicting that the plaintiff might establish liability' " under the Jones Act. *Id.*[2]

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federal jurisdiction other than admiralty, such as diversity of citizenship or a statute. *See Poirrier v. Nicklos Drilling Co.*, 648 F.2d 1063, 1066 (5th Cir. 1981); *Tennessee Gas Pipeline*, 87 F.3d at 153 & nn. 5 & 6.

[2] An additional basis on which to show fraudulent pleading--that there has been an outright fraud in the pleading of jurisdictional facts--is not involved or asserted in this case. *See Burchette*, 48 F.3d at 176 n.1.

In order to recover under the Jones Act, the plaintiff's complained-of injury must have been suffered while he was a seaman and in the course of his employment. Section 688(a) (authorizing action by "[a]ny seaman who shall suffer personal injury in the course of his employment"). In order to be a seaman, an individual (among other things) "must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature." *Harbor Tug and Barge Co. v. Papai*, 117 S.Ct. 1535, 1540 (1997) (quoting *Chandris, Inc. v. Latsis*, 115 S.Ct. 2172, 2179 (1995) (citations and internal quotation marks omitted)).

Fields does not dispute that he has no possible Jones Act claim if the Neptune Spar is not a vessel, and he claims no substantial connection to anything else which he contends is a vessel or fleet of vessels.[3] And Fields has never

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[3] In his state court pleading, Fields alleged that at the time of his injury he "was employed as a roughneck/derrickhand as a member of the crew of Rig 10, in such a manner as to contribute to the overall intended purpose of said vessel," refers to the vessel, Rig 10," and then alleges "the aforesaid vessel was in navigation in the Gulf of Mexico"; the pleading does not allege that the Neptune Spar was a vessel or even mention it. However, the undisputed evidence establishes that Rig 10 was nothing more than a collection of several separate items of Pool's drilling equipment used by it to provide workover and drilling operations on offshore platforms, and which had, prior to Fields' injury, been transported to and assembled on the Neptune Spar. Fields was injured while on the Neptune Spar utilizing this assembled equipment. Rig 10 does not even float and cannot move on its own, and it is obviously not a vessel. Fields' only argument on appeal is that the Neptune

contended that if the district court correctly determined that the Neptune Spar is not a vessel, it nevertheless erred in granting Pool's motion for summary judgment.

A vessel is "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. § 3. In general, the "greater the structure's resemblance to conventional seafaring craft, the greater the odds of securing vessel status". *Gremillion v.Gulf Coast Catering Co.*, 904 F.2d 290, 293 (5th Cir. 1990). Unusual appearance alone will not suffice to preclude vessel status, however. We have recognized "a variety of special purpose structures, far removed from the conventional notions of ships and seagoing barges, to be vessels." *Manuel v. P.A.W. Drilling & Well Service, Inc.* 135 F.3d 344, 348 (5th Cir. 1998). Fields argues that the Neptune Spar is such a specialized structure, and thus, interpreting all facts in his favor, must be viewed as a vessel. Defendants argue, however, that the Neptune Spar can only be characterized as a work platform under our precedent, and thus escapes vessel classification.

Courts have long recognized a distinction between "work platforms" that are designed for primarily stationary residence and true vessels. *See Cope v. Vallette Dry-Dock Co.*, 7 S.Ct. 336 (1887) (floating dry dock is not a vessel). Looking to the language of the statute, we have consistently defined vessel status in reference to the importance of transportation as the craft's purpose. *Manuel,* 135 F.3d at

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Spar is a vessel and furnishes the basis for his claim of seaman status.

348. In particular, we have focused on three factors when trying to determine whether a structure is a work platform beyond the realm of the Jones Act. First, we ask whether the structure was constructed to serve primarily as a work platform. Second, we look to whether or not the structure was moored or otherwise secured at the time of the accident. Lastly, we attempt to ascertain whether the transportation function of the structure went beyond theoretical mobility and occasional incidental movement. *See Burchett,* 48 F.3d at 176.

In applying the three-factor test of work-platform status to the Neptune Spar, it becomes apparent that it cannot be a vessel. As the defendants' affidavits indicated, there are no plans to even consider moving the Neptune Spar until the current field is exhausted. While nothing can ever be certain in the petroleum industry, the unchallenged prediction of defendants is that the field will remain productive for the next fifteen years. This distinguishes the Neptune Spar from the types of specialized-mobile drilling craft that we have previously classified as vessels. As we have taken care to point out, while such drilling craft may stay on a particular site, they always move on to the next location when their work is done. *See Manuel,* 135 F.3d at 346 (noting that drilling vessel had been deployed at nineteen different sites over the course of two years); *Columb v.* Texaco, *Inc.,* 736 F.2d 218, 221 (5th Cir. 1984) ("highly mobile" submersible drilling barge was "routinely" refloated and moved to the next location). *See also Blanchard v. Engine and Gas Compressor Services, Inc.,* 575 F.2d 1140, 1143 (5th Cir. 1978) (distinguishing work platform from drilling barge rigs because there was no intention to move structures "on a regular basis, as is done with submersible drilling rigs"). Unlike these

vessels, the Neptune Spar is designed not only to discover and open a field, but also to exploit it--a goal that requires considerably greater commitment to a particular location. Given these undisputed facts, it would seem readily apparent that the primary, indeed only, purpose of the Neptune Spar is to serve as a work platform in a specific, fixed location for the foreseeable future.

The work platform status of the Neptune Spar is reinforced by reference to the second factor. The Neptune Spar was not only secured to the ocean floor at the time of the accident, it was secured using an elaborate system that guarantees movement will be a difficult and expensive undertaking. We are not talking about a case in which a structure merely rests on the bottom or is secured by a run-of-the-mill anchor. Here, the defendants have at presumably considerable expense sunk massive (180 foot) pilings into the ocean floor, and attached the spar to these pilings by means of similarly impressive chain lines. And like its sibling conventional fixed production platforms, the Neptune Spar is further anchored in position by the underwater infrastructure of extraction and exportation pipes that transport the petroleum from wellhead to the platform and from the platform to the shore. In this case, the infrastructure consists of two eight-inch pipelines and seven nine-and-a-half-inch casing risers. This distinguishes it from other structures whose commitment to a particular location is less firmly evidenced by the strength of their physical attachment. *Cf. Hicks v.* Ocean *Drilling and Exploration Co.*, 512 F.2d 817, 823-24 (5th Cir. 1975) (evidence sufficient to sustain jury finding that submersible petroleum storage barge sunk to the bottom and then connected to nearby platform by pipe and

catwalk, but not in any way affixed into seabed, was a vessel)[4] with *Blanchard,* 575 F.2d at 1143 (5th Cir. 1978) (compressor building mounted on submersible barge was distinguishable from structure in *Hicks* because barge was anchored with steel cables attached to fixed pilings); *Hemba v. Freeport McMoran Energy Partners, Ltd.,* 811 F.2d 276, 278 (5th Cir. 1987) (rig attached by pilings driven two hundred feet into the seabed was not a vessel).

Any lingering doubt would seemingly be eradicated by examination of the third factor. While the Neptune Spar remains in its current position, it will have extremely limited and purely incidental mobility. According to the defendants' unchallenged affidavits, the Neptune Spar can be moved by tightening and slackening the chain lines connected to the pilings. This procedure is used to place the structure over one of the site's seven closely packed wellheads to perform needed work. Because of the location of the pilings, however, this movement is limited to 250 feet in any direction. This tightly-constrained range of motion is not inconsistent with work platform status. *See Burchett,* 48 F.3d at 177-78 (loading

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[4] In *Hicks,* the structure was sunk by the intake of easily-dischargeable water ballast and lacked secure purchase on the sea floor. Its owners were also somewhat vague about their future plans to possibly move the structure, admitting at one point that such a move had been considered. Insofar as the first prong of the work-platform test is concerned, the indeterminacy of the owners' intentions in *Hicks* serves to distinguish it from the case before us. We also note that two cases have explicitly recognized the narrowing of *Hicks*. *See Johnson v. Odeco Oil and* Gas, 864 F.2d 40, 43 (5th Cir. 1989) (*"Hicks* is no longer the controlling standard"); *Gremillion,* 904 F.2d at 294.

barge was a work platform despite the fact it was regularly moved to align itself with boat receiving goods); *Cook v. Belden Concrete Products, Inc.*, 472 F.2d 999, 1002 (5th Cir. 1973) (construction barge that was regularly towed into open water to launch completed craft was not a vessel). While there remains some theoretical possibility of more lengthy movement when the current field is exhausted, the mere possibility of movement so many years hence cannot render irrelevant the structure's current and long-term immobility.

Under the three-prong test of work-platform status, then, the Neptune Spar is clearly not a vessel. While we have also referenced various other factors that might guide the inquiry into vessel status,[5] we have held that in work platform cases resort to such an analysis is unnecessary if the three major factors indicate that the structure is not a vessel. *See Burchett*, 48 F.3d at 177 (additional factors are secondary and useful only in determining close cases). As we have noted, fixed offshore oil platforms--which obviously are not vessels, *see Rodrigue v. Aetna Casualty and Surety Co.*, 89 S.Ct. 1835, 1840-43 (1968) ("man-made islands" not subject to admiralty law)--contain some of these additional factors such as lifeboats and crew quarters. *See Johnson*, 864 F.2d at 43 (noting factors could not be determinative since "they

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[5] The most comprehensive enunciation of these factors is 1) intention to move on a regular basis; 2) ability of submerged structure to be refloated; 3) the length of time the structure has remained at its current location; 4) the presence of navigational aids; 5) a raked bow; 6) life-boats and rescue equipment; 7) bilge-pumps; 8) crew-quarters; 9) registration as a vessel with the Coast Guard. *See Johnson*, 864 F.2d at 43.

routinely exist on structures, such as production platforms, that are not vessels"). Application of these factors is unnecessary in this case.

Faced with the above analysis, Fields largely relies on two points. The first is the payment of maintenance to Fields by Pool and statements by employees of Pool's adjusters. Maintenance is a seaman's remedy, and in special circumstances the payment of maintenance may properly be admitted as evidence of seaman status. *See Savoie v. Otto Candies, Inc.*, 692 F.2d 363, 367-368 (5th Cir. 1982).[6] No such circumstances are present here. Moreover, the payment of maintenance is at most only one factor out of many, *see id.*, and cannot by itself justify remand given the clarity of the Neptune Spar's work platform status. This is especially so since the decision to pay maintenance was made by Pool, not Oryx. Pool does not own or run the Neptune Spar, and

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[6] In *Savoie*, the plaintiff had worked as a deckhand on the defendant employer's vessel on October 21, 1979, and then worked on his employer's duck blinds on shore until some seven days later when he was injured while so engaged. The issue was whether at the time of the injury he was still a member of the vessel's crew. The defendant asserted he was not as it had "discharged" him from the vessel. We held that the defendant's payment of maintenance was admissible to show that the "discharge" was not "intended to fully terminate Savoie as a Candies seaman, as opposed to being merely a routine formality when a seaman was temporarily rotated off the ship and expected to soon return to his duties there in accordance with normal practice" and that the maintenance "payments tended to show that Candies regarded Savoie as being a seaman at the time of the accident, notwithstanding his prior 'discharge.'" *Id.* at 367. No such special relevance is present here.

whatever inference might theoretically have arisen had the owner Oryx--presumably intimately familiar with the nature and purpose of its own structure--designated maintenance as a remedy is greatly weakened here. The fact that employees of Pool may have implicitly classified the Neptune Spar as a vessel is of marginal significance at the very best.

Fields also complains that the district court denied him an adequate opportunity to respond to defendants' arguments prior to its determination that lack of vessel status precluded remand, and compounded this error by refusing to reconsider that determination in light of new evidence he presented in his opposition to summary judgment. In his initial motion for remand, Fields did not submit any evidence indicating that the Neptune Spar might be a vessel other than the payment of maintenance and statements by employees of Pool's adjusters. In their response, defendants attached affidavits from employees of Oryx which clearly establish that the Neptune Spar is not a vessel. Prior to the previously scheduled hearing date on the motion to remand, Fields did not either submit a response to defendants' arguments or request more time to do so. On the afternoon of the day the district court denied the motion to remand, Fields requested an extension, which was denied as moot.

Fields later filed a motion for reconsideration, and also included as exhibits to his motion in opposition to Pool's motion for summary judgment a variety of print outs--*not* in proper affidavit form or appropriately authenticated--assertedly taken from the Internet and from the petroleum industry press in order to challenge the lower court's denial of remand. In granting summary judgment for Pool, the district court refused to reconsider its prior rejection of vessel

status in light of this material. Fields concedes that these determinations by the district court must be reviewed under an abuse of discretion standard. Given the fact that the only evidence Fields has been able to unearth up to this point was publicly available and could have been attached to the initial motion to remand or proffered in the wake of defendants' response to that motion, we cannot say that the district court abused its discretion in refusing to consider this tardily and improperly presented material.[7]

The district court thus properly determined that, as a matter of law, the Neptune Spar is not a vessel. The denial of the motion to remand and the subsequent grant of summary judgment in favor of Pool was thus proper.

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[7] In any case, the material hardly advances Fields' cause. It confirms that the Neptune Spar will remain at its present location until the field is exhausted (some fifteen or more years)--the chief factor precluding vessel status. It also indicates that the Neptune Spar was transported to its current location in two pieces strapped aboard a heavy lift ship and assembled on site, a strong indication that long distance movement of the assembled spar is a difficult undertaking. Fields also makes a perfunctory challenge to the district court's denial of his motion (filed some three weeks after his notice of appeal) to supplement the record with material not theretofore filed with or otherwise before the district court. Fields failed to enunciate a specific statement of the reasons that required supplementation. As the district court noted, he thus failed to comply with Local Rule 26.5.1(e) of the Eastern District of Louisiana. The denial of the motion was not an abuse of discretion.

Conclusion

For the reasons stated, the judgment of the district court is

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

[Filed December 8, 1997]

No. 97-3170

HERMAN FIELDS *Plaintiff,*	)	
v.	)	CIVIL ACTION Section "N"
POOL OFFSHORE, INC. AND ORYX ENERGY COMPANY *Defendants,*	)	

ORDER AND REASONS
Entered: December 8, 1997

Before the Court is plaintiff's Motion to Remand. For the following reasons, the Court DENIES plaintiff's motion.

On August 27, 1997, plaintiff, Herman Fields ("Fields") filed a Seaman's Complaint in the Civil District Court for the Parish of Orleans, State of Louisiana, seeking recovery for damages allegedly sustained by him aboard the NEPTUNE SPAR on or about February 20, 1997. Named as defendants were Pool Company ("Pool") (erroneously referred to in the complaint as "Pool Offshore, Inc."), a

foreign corporation with its principal business establishment in the State of Louisiana, and Oryx Energy Company ("Oryx,), a foreign corporation with its principal business establishment in the State of Louisiana.

At the time of plaintiff's alleged accident, he was employed as a roughneck/derrickhand on platform Rig No. 10, which, according to the complaint, was jointly owned, operated, and managed by defendants Pool and Oryx.[1] Rig No. 10 was assembled on the NEPTUNE SPAR, a floating platform which at the time of plaintiff's alleged injuries was located on the Outer Continental Shelf ("OCS") 100 miles off the Alabama coast. Field's injuries allegedly occurred when he was assisting in removing a bushing which became jammed in the rig, and the bushing pulley slipped out, striking Fields in the face.

In his state court suit, Fields invoked the Jones Act, 26 U.S.C. § 688, and the General Maritime Law. Plaintiff invoked state court jurisdiction over his Jones Act claim under the "Saving to Suitors" clause, 28 U.S.C. § 1331(1). Plaintiff alleged in his complaint that he was a "member of the crew of Rig 10" and "contributed to the overall intended purpose of said vessel.[2] On October 8, 1997, defendants filed a Notice of Removal of plaintiff's claims to federal court. Defendants argued as the basis of their Notice of Removal that plaintiff's Jones Act claim was improperly joined to defeat

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[1] Plaintiffs Complaint, para IV.

[2] Id. at para. III.

federal court jurisdiction. The instant motion to remand followed.

ANALYSIS

This case was properly removed from state to federal court, as this Court has original as well as federal question jurisdiction over claims arising under the Outer Continental Shelf Lands Act (OCSLA). Production platforms, such as the Neptune Spar, which are permanently attached to the Outer Continental Shelf (OCS), implicate the OCSLA rather than the Court's admiralty jurisdiction. White v. Chevron, 1990 WL 28167 *2 (E.D. La. 1990) (citing Rodrigue v. Aetna Casualty Co., 395 U.S. 353 (1969). Therefore, this action was properly removed from state court.

A. The Jones Act does not apply to plaintiff's claims, as plaintiff was not a seaman aboard a vessel at the time of his injuries.

In his state court complaint, plaintiff avers that, "The jurisdiction of this Court is invoked under 26 U.S.C. § 688, commonly known as the Jones Act, and 28 U.S.C. § 1331(1), otherwise known as the 'Savings to Suitors' clause, with surrogate application of the General Maritime Law.[3] Plaintiff is correct in noting that, as a general rule, Jones Act suits are not removable. Johnson v. ODECO Oil & Gas Co., 864 F.2d 40, 42 (5th Cir. 1989). However, in certain circumstances, such as where there has been an allegation of fraudulent joinder, the Court can pierce the pleadings and analyze

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[3] Plaintiff's Complaint, para. 2.

supporting affidavits to determine whether the plaintiff's claims "are baseless in law and in fact." Lackey v. Atlantic Richfield Co., 990 F.2d 202, 207 (5th Cir. 19930 (quoting Dodd v. Fawcett Publication, Inc., 329 F.2d 82, 85 (10th Cir. 1964)). After analyzing the pleadings and supporting affidavits submitted by the parties, the Court finds as a matter of law that plaintiff's claims do not arise under admiralty law, but rather the OCSLA, a separate basis of federal question jurisdiction.

Plaintiff cannot be a seaman within the coverage of the Jones Act, because his alleged injuries did not occur on board a vessel. The Fifth Circuit has consistently held that fixed work platforms such as the Neptune Spar, are not "vessels" within the meaning of the Jones Act. For example, in Ellender v. Kiva Constr. & Engineering. Inc., 909 F.2d 803 (5th Cir. 1990), the court noted that the touchstones of the inquiry into "Jones Act vessel" status are (1) the purpose for which the craft was built and (2) the business in which it was engaged at the time of the alleged injury. Id. at 806. Based on this test, the Ellender court held that a four-barge platform assembly was not a "Jones Act vessel," where the barge was built primarily to serve as a work platform, had no independent means of navigation, and the assembly was securely anchored in calm waters at the time of the accident. Id. at 807. In examining prior Fifth Circuit case law holding that floating work platforms did not constitute "vessels" under the Jones Act, the Ellender court found three factors common to these decisions:

> (1) the structures involved were constructed and used primarily as work platforms; (2) they were moored or otherwise secured at the time

> of the accident; and (3) although they were capable of movement and were sometimes moved across navigable waters in the course of normal operations, any transportation function they performed was merely incidental to their primary purpose of serving as work platforms.

Id. at 806 (citing Daniel v. Ergon, Inc., 892 F.2d 403, 407 (5th Cir. 1990). See also Johnson v. ODECO Oil and Gas Co., 864 F.2d 40 (5th Cir. 1989) (offshore oil drilling platform not a "vessel" for Jones Act purposes, where in fixed location for 24 years, and lacking in navigational devices); Leonard v. Exxon Corp., 581 F.2d 522 (5th Cir. 1978) (floating construction platform moored "more or less permanently" to shore and not capable of self-propulsion not a "vessel"); Hemba v. Freeport McMoran Energy Partners, Ltd., 811 F.2d 276 (5th Cir. 1987) (structure attached to gulf bottom by pilings driven into sea floor not a vessel).

Under these precedents, the Neptune Spar platform upon which plaintiff was injured in the instant case does not constitute a vessel for purposes of the Jones Act.[4] The undisputed affidavits submitted by defendant state that the

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[4] Under the same analysis applied to the "vessel" status of the Neptune Spar, the Court also finds as an initial matter that Platform Rig No. 10, which was assembled on the Neptune Spar at the time of plaintiff's alleged accident, is not a vessel for purposes of the Jones Act. A "platform" rig is equipment that is transported to an offshore platform and assembled aboard that platform to perform workover and/or drilling operations. It cannot float or move on its own. See Affidavit of Cathy Orgeron, Personnel Services Supervisor for Pool Company, p. 1.

Neptune Spar was constructed to serve as an offshore oil and gas production platform.[5] At the time of plaintiff's alleged injuries, the Neptune Spar was permanently attached to the Outer Continental Shelf by use of six chain/wire rope lines, six pilings imbedded in the OCS, and two permanent pipelines which extend from the Neptune Spar to the OCS sea floor.[6] Furthermore, the Neptune Spar will remain at this location for the next 15 to 20 years while it produces oil and gas from the OCS.[7]

The occasional minimal movement of the Neptune Spar does not change this result. The Manager of the Neptune Project, Robert Don Vardeman, admits that the Neptune Spar can move up to 250 feet by tightening and slackening the lines to facilitate the placement of the Neptune Spar directly over each well.[8] The Fifth Circuit held in Cook v. Belden Concrete Prods., Inc., 472 F.2d 999, 1002 (5th Cir. 1973), that "[S]ome movement, both perpendicular and lateral, is necessarily part of the regular operation of floating dry docks and similar structures. However, capability to sustain such movement has been held insufficient to establish that such craft are constructed for the purpose of navigation." Furthermore, the Court finds the instant spar platform distinguishable from the "special purpose" structures

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[5] See Affidavit of Robert Don Vardeman, Manager of the Neptune Project, p. 1.

[6] Vardeman Affidavit, p. 1.

[7] Memorandum in Opposition to Motion to Remand, p. 5.

[8] Vardeman Affidavit, p. 2.

discussed in the Offshore Company v. Robison, 266 F.2d 769 (5th Cir. 1959), and its progeny. In Robison, the court found that a mobile drilling platform with retractable legs that was moved among various well locations in the Gulf was a Jones Act vessel. Id. at 771. In the instant case, the minimal movement capability of the Neptune Spar, combined with the lack of a self propulsion system and the non-navigational purpose of the structure, leads this Court to find that the Neptune Spar is not a vessel for purposes of the Jones Act.

B. This Court has federal question jurisdiction over plaintiff's claims under the OCSLA, such that this action was properly removed from state court.

The "Savings to Suitors" clause of 28 U.S.C. § 1333(1) does not apply in this case, because plaintiff has failed to state a claim under the Jones Act or general maritime law. Rather, plaintiff's alleged injuries fall within the coverage of the OCSLA.

The Supreme Court in Rodrigue held that production platforms are not within the admiralty jurisdiction of the federal courts. 395 U.S. at 364. Rather, such structures are specifically included within the OCSLA. Id. Federal courts have federal question jurisdiction over personal injury actions arising under the OCSLA. Continental Oil CO. v. London Steam-Ship Owners' Mutual Ins. Assoc., 417 F.2d 1030 (5th Cir. 1969); White, 1990 WL 28167 at *2. Plaintiff's claims are therefore properly removable to this Court. Id.; Broussard v. John E. Graham & Sons, 798 F.Supp. 370 (M.D. La. 1992); 28 U.S.C. § 1441(a) & (b).

The fact that plaintiff's state court petition did not invoke jurisdiction under OCSLA is not dispositive of this issue. In White, the court, noting that the presence or absence of federal court jurisdiction is governed by the "well-pleaded complaint" rule, found that where an action arose on the OCS, the plaintiffs, exclusive remedy was pursuant to the OCSLA, even where plaintiffs did not plead OCSLA in their state court petition. 1990 W-L 28167 at *1. To hold otherwise, the court found, would allow a plaintiff to "defeat removal by 'artfully' omitting essential federal issues from a state court petition. Id. (quoting Eitmann v. New Orleans Public Serv., Inc., 730 F.2d 359, 365 (5th Cir. 1984). Thus, plaintiff's claims were properly removed to this court pursuant to 28 U.S.C. § 1441.

C. Plaintiff's Request for Attorney's Fees and Costs.

Plaintiff requests costs and attorneys fees, arguing that they may be recovered for an improperly removed action pursuant to 28 U.S.C. § 1447(c). Because this case is properly before this Court under its federal question jurisdiction, the Court declines to assess attorney's fees and costs against defendants.

Accordingly, plaintiff's Motion to Remand is DENIED.

New Orleans, Louisiana, this 5th day of December, 1997.

/s/_____
EDITH BROWN CLEMENT
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
DEC 29 1999
CLERK

(2)

No. 99-924

In the Supreme Court of the United States

OCTOBER TERM, 1999

HERMAN FIELDS,

Petitioner,

V.

POOL COMPANY, incorrectly sued as Pool Offshore, Inc.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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10pp

PARTIES TO THE PROCEEDING

Respondents

Pool Company

Pool Company's parent companies are Nabors Holding Company and Nabors Industries, Inc.

Pool Company's non-wholly owned subsidiary is Pool International Argentina S.A.

TABLE OF CONTENTS

Parties to the Proceeding i

Table of Contents.....ii

Table of Authorities.....iii

Statement of the Case.....1

Arguments for Denying Writ.....4

Argument I.....4

Argument II.....6

Argument III.....9

Conclusion.....11

TABLE OF AUTHORITIES

Cases: **Page**

Atkins v. Greenville Shipbuilding Corp., ...6
411 F.2d 279 (5th Cir.),
cert denied, 396 U.S. 846, 90 S.Ct. 105, 24 L.Ed. 2d 96 (1969)

B., Inc. v. Miller Brewing Co., ...10
663 F.2d 545, 551 (5th Cir. 1981)

Boyle v. Chicago, R.I. & P. Ry. Co., ...5,9
42 F.2d 633, 634 (8th Cir. 1930)

Braxton v. U.S., ...4
500 U.S. 344, 347, 111 S.Ct. 1854, 1857, 114 L.Ed. 2d 385 (1991)

Burchett v. Cargill, Inc., ...7
48 F.3d 173, 176 (5th Cir. 1995)

Chandris, Inc. v. Latsis, ...2,5
515 U.S. 347, 115 S.Ct. 2172, 132 L.Ed. 2d 314 (1995)

Chesapeake & 0. R. Co. v. Cockrell, ...5,9
232 U.S. 146, 34 S.Ct. 278, 58 L.Ed. 544 (1914)

Cook v. Belden Concrete Products, Inc., ...6
472 F.2d 999, 1001 (5th Cir.),
cert denied, 414 U.S. 868, 94 S.Ct. 175, 38 L.Ed. 2d 116 (1973).

Cope v. Vallette Dry-Dock Co., ...6,8
119 U.S. 625, 7 S.Ct. 336, 30 L.Ed. 501 (1887)

Dodd v. Fawcett Publications, Inc., ...3,9
329 F.2d 82, 85 (10th Cir. 1964)

Great Northern Ry. Co. v. Alexander, ...5,9
246 U.S. 276, 38 S.Ct. 237, 62 L.Ed. 713 (1918)

Harbor Tug and Barge Co. v. Papai, ...2,5
520 U.S. 548, 117 S.Ct. 1535, 137 L.Ed. 2d 800 (1997)

Leonard v. Exxon Corp.,
581 F.2d 522, 524 (5th Cir. 1978), ...6
cert denied, 441 U.S. 923, 99 S.Ct. 2032, 60 L.Ed.
2d 397 (1979).

Manuel v. P.A.W. Drilling & Well Service, Inc., ...6-7
135 F.3d 344, 348 (5th Cir. 1998)

The Robert W. Parsons, ...5,6,7,8
191 U.S. 17, 30, 24 S.Ct. 8, 12, 48 L.Ed. 73 (1903)

Statutes

1 U.S.C. §3.....6

28 U.S.C. §1333(l).....9

43 U.S.C. §1331.....3

U.S. Sup. Ct. Rule 10.....4

STATEMENT OF THE CASE

Herman Fields, a former derrick hand employed by Pool Company, was allegedly injured on or about February 26, 1997 while working on Pool Company's ("respondent") platform rig no. 10. A "platform" rig describes equipment which Pool uses to provide workover and drilling operations on offshore fixed platforms. This equipment is transported to and assembled on an offshore fixed platform. The undisputed evidence offered in the lower courts proved that a "platform" rig is not a vessel, it does not float and it cannot move on its own. As such, there is little question that the lower courts were correct in concluding that Pool's rig no. 10, to which plaintiff was assigned, was not a vessel.

At the time of petitioner's alleged accident, respondent's platform rig no. 10 was assembled on Oryx Energy Company's Viosca Knoll Area, Block 836, Neptune Spar platform located on the Outer Continental Shelf ("OCS"), 100 miles off the Alabama coast. The accident occurred when petitioner was assisting in removing a bushing which became jammed in the rotary table of respondent's rig no. 10. Allegedly, Fields leaned over the bushing to guide it out of the rotary table when the bushing pulley slipped out, striking Fields in the face.

Oryx's Neptune Spar platform was placed on location in the Viosca Knoll Area, Block 826 on the OCS in late September, 1996. The undisputed evidence proved that the Neptune Spar was designed to remain at this exact location for the 15 to 20 years of productive life of the wells on the seabed below it. The uncontradicted evidence further proved that the Neptune Spar was permanently attached to the OCS by use of six chain/wire rope lines which connected the

Neptune Spar platform to six massive pilings which were driven into the sea floor of the OCS. These pilings are seven feet in diameter and 180 feet long. In addition to these six lines, the unrefuted evidence also proved that two permanent eight inch diameter pipelines extend from the top deck of the Neptune Spar to the OCS sea floor. The Neptune Spar is also connected to the OCS sea floor by seven, nine and 5/8 inch casing risers from the seven individual wellheads located on the sea floor. Due to these permanent connections to the sea floor, the Neptune Spar is only capable of extremely limited movement. More particularly, the undisputed evidence offered in the courts below confirmed that the Neptune Spar can move no further than 250 feet by tightening and slackening its six lines. Even then, this limited movement is only to allow the Neptune Spar access to and to facilitate production from the seven wells located below the platform by allowing for more efficient reworking and redrilling of the wells by placing the Neptune Spar directly above each well. As such, this limited movement is solely for the purpose of assisting the Neptune Spar in performing its function as an oil and gas production platform.

While not relied upon by the lower courts in their decisions, the undisputed evidence offered in the courts below also proved that Fields did not have a sufficient temporal connection to the Neptune Spar, even if it is a vessel, which is denied, to meet this Court's requirements under *Chandris, Inc. v. Latsis,* 515 U.S. 347, 115 S.Ct. 2172, 132 L.Ed. 2d 314 (1995) and *Harbor Tug and Barge Co. v. Papai,* 520 U.S. 548, 117 S.Ct. 1535, 137 L.Ed. 2d 800 (1997). More particularly, plaintiff was only temporarily assigned to Pool's platform rig no. 10 which was only temporarily aboard Oryx's Neptune Spar. All of Fields' other work for Pool was performed solely on platform rigs which

were used aboard stationary, fixed platforms prior to the incident in question. Therefore, the evidence clearly showed that Fields was never permanently assigned to the Neptune Spar or any vessel.

Based on these undisputed facts, the U.S. District Court for the Eastern District of Louisiana found that the Jones Act did not apply to petitioner's claims as he was not a seaman aboard a vessel at the time of his injuries. More particularly, U.S. District Judge Edith Brown Clement denied plaintiff's Motion to Remand finding that the federal district court had subject matter jurisdiction over petitioner's claims under the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. §1331, and that the case was properly removed from state court. Judge Clement in her well reasoned opinion expressly relied upon the settled doctrine that even when a case is not apparently removable, a federal district court "can pierce the pleadings and analyze supporting affidavits to determine whether the plaintiff's claims 'are baseless in law and in fact.'" (A. 19-20) (quoting *Dodd v. Fawcett Publications, Inc.*, 329 F.2d 82, 85 (10th Cir. 1964)). Respondent then moved for summary judgment seeking dismissal of petitioner's claims on the basis that Pool was immune from suit pursuant to the exclusive remedy provisions of the OCSLA, as the district court had found that petitioner was not a Jones Act seaman. By Order and Reasons dated February 2, 1998, U.S. District Judge Edith Brown Clement granted respondent's Motion for Summary Judgment confirming that Fields was not a Jones Act seaman and respondent was entitled to summary judgment as Fields' OCSLA statutorily immune employer.

Petitioner timely appealed this ruling to the U.S. Court of Appeals for the Fifth Circuit. In its Opinion of July

27,1999, the Court of Appeals affirmed the District Court in all respects, finding as a matter of law under its prior jurisprudence that the Neptune Spar was a platform, not a vessel. Moreover, the Fifth Circuit held that the District Court had properly used its discretion in piercing the plaintiff's pleadings and declining to remand the case to state court.

ARGUMENTS FOR DENYING WRIT

ARGUMENT I

Petitioner has failed to offer compelling reasons for granting a writ of certiorari.

Rule 10 of the Rules of the United States Supreme Court specifically provides that "[rleview on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." The principal purpose for which this Court grants writs of certiorari is to decide conflicting cases between the federal appellate courts and state courts regarding federal law. *Braxton v. U.S.*, 500 U.S. 344, 347, 111 S.Ct. 1854, 1857, 114 L.Ed. 2d 385 (1991).

To further elaborate on this rule, the Court has provided a non-exclusive list of cases which it generally accepts for decision on writs of certiorari. The present case does not approach these illustrations in any way. More particularly, the U.S. Fifth Circuit's opinion in the present case does not in any way conflict with the decision of any other court. Even a cursory review of the appellate court's decision clearly shows that it is well reasoned and supported by prior decisions of that court on vessel status. (A. 8-12) In fact, the U.S.

Fifth Circuit considered and analyzed virtually all the cases upon which petitioner relies in his writ application and either factually distinguished those cases or found other cases to be more persuasive and controlling in its finding that the Neptune Spar was not a vessel. As such, petitioner's argument that this Court should exercise its supervisory power based upon the U.S. Fifth Circuit's alleged departure from its prior jurisprudence is wholly unfounded.

Petitioner has also failed to show that the U.S. Fifth Circuit's opinion in any way conflicts with relevant decisions of this Court. The appellate court clearly followed the test formulated by this Court to decide vessel status cases and applied those factors correctly to conclude that the Neptune Spar was a platform and not a vessel. *The Robert W. Parsons*, 191 U.S. 17, 30, 24 S.Ct. 8, 12, 48 L.Ed. 73 (1903); *Cope v. Vallette Dry-Dock Co.*, 119 U.S. 625, 7 S.Ct. 336, 30 L.Ed. 501 (1887). In addition, the appellate court reviewed and followed this Court's recent decisions in *Harbor Tug and Barge Co. v. Papai*, 520 U.S. 548, 117 S.Ct. 1535, 137 L.Ed. 2d 800 (1997) and *Chandris, Inc. v. Latsis*, 515 U.S. 347, 115 S.Ct. 2172, 132 L.Ed. 2d 314 (1995) in analyzing whether the Neptune Spar was a vessel and petitioner a seaman. (A. 7) Furthermore, the lower courts' decisions on removal were guided by and followed well supported jurisprudence in both the appellate courts and this Court. *Great Northen Ry. Co. v. Alexander*, 246 U.S. 276, 38 S.Ct. 237, 62 L.Ed. 713 (1918); *Chesapeake & 0. R. Co. v. Cockrell*, 232 U.S. 146, 34 S.Ct. 278, 58 L.Ed. 544 (1914); *Boyle v. Chicago, R.I. & P. Ry. Co.*, 42 F.2d 633, 634 (8th Cir. 1930). As such, petitioner has completely failed to set forth any proper basis for this Court to exercise its discretion and grant a writ of certiorari in the present case.

ARGUMENT II

The Neptune Spar is legally a platform, not a vessel.

Congress defined the term "vessel" as "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation by water." 1 U.S.C. §3. Based upon this legal definition, this Court, as well as the appellate courts of the United States, have repeatedly held that the most fundamental factor for determination of whether a structure is a vessel or a platform is the purpose for which it was constructed and the business in which it was engaged. *The Robert W. Parsons,* 191 U.S. at 30; *Cook v. Belden Concrete Products, Inc.*, 472 F.2d 999, 1001 (5th Cir.), *cert denied*, 414 U.S. 868, 94 S.Ct. 175, 38 L.Ed. 2d 116 (1973). Moreover, for over 100 years courts have held that certain objects which undeniably float, including dry-docks, are still not vessels. *Cope v. Vallette Dry-Dock Co.*, 119 U.S. 625, 7 S.Ct. 336, 30 L.Ed. 501 (1887); *Atkins v. Greenville Shipbuilding Corp.*, 411 F.2d 279 (5th Cir.), *cert denied*, 396 U.S. 846, 90 S.Ct. 105, 24 L.Ed. 2d 96 (1969). Likewise, other floating platforms that had no mode of power, but were towed short distances, have been found not to be vessels under the Jones Act as a matter of law as they were "legally indistinguishable from a floating dry dock." *Cook*, 472 F.2d at 1000; *Leonard v. Exxon Corp.*, 581 F.2d 522, 524 (5th Cir. 1978), *cert denied*, 441 U.S. 923, 99 S.Ct. 2032, 60 L.Ed. 2d 397 (1979).

In refining the vessel status test announced by this Court in *The Robert W. Parsons* and *Cope*, the U.S. Fifth Circuit Court of Appeals has correctly looked "to the importance of transportation as the craft's purpose." (A.8) (citing *Manuel v. P.A.W. Drilling & Well Service, Inc.*, 135 F.3d 344,

348 (5th Cir. 1998)). As noted by the U. S. Fifth Circuit in the present case, the appellate courts have particularly focused on three factors in deciding vessel status cases:

> (1) Whether the structure involved was constructed and used primarily as a work platform;
>
> (2) Whether it was moored or otherwise secured at the time of the accident; and
>
> (3) Whether any transportation function it performed was merely incidental to its primary purpose as a platform even if it was capable of moving and was sometimes moved across navigable waters in the course of normal operations.

Burchett v. Cargill, Inc., 48 F.3d 173, 176 (5th Cir. 1995). This test is expressly founded upon this Court's pronouncement in *The Robert W. Parsons* that the determination of vessel status should be based on "the purpose for which the craft was constructed and the business in which it was engaged." *The Robert W. Parsons,* 191 U.S. at 30.

In applying this test to the present undisputed facts, the lower courts correctly held that the Neptune Spar was constructed to primarily serve as a work platform, was permanently moored at the time of the petitioner's alleged accident, and served no transportation function beyond occasional incidental movement and theoretical mobility. As such, the Neptune Spar was properly determined to be a work platform and not a vessel under this Court's holding in *The Robert W. Parsons* and its progeny. Specifically, the appellate court correctly concluded based on the undisputed evidence offered in the district court that the sole purpose of

the Neptune Spar was to function as a platform from which the oil and gas field below it could be exploited and produced. The unchallenged evidence further showed that the Neptune Spar would remain in its current position for no less than the next 15 years and would not move from place to place like the specialized mobile drilling craft which courts have previously classified as vessels. Likewise, the appellate court correctly concluded, as required by this Court in *The Robert W. Parsons*, that the Neptune Spar was engaged "in the business" of a work platform as it was completely and totally secured to the sea floor "using an elaborate system that guarantees movement will be a difficult and expensive undertaking." (A. 10) The uncontested facts proved that the Neptune Spar was secured at considerable expense by chain lines to massive pilings imbedded in the sea floor and further fixed to the sea floor by its underwater infrastructure of pipelines and wellhead risers. Finally, the appellate court correctly decided that any question regarding the Neptune Spar's platform status was dispelled by the undenied evidence that the Neptune Spar could only be moved 250 feet in any direction. Under this Court's decision in *Cope*, such limited movement of a floating object is conclusive evidence of the craft's work platform status and non-vessel status.

Accordingly, both the U.S. District Court for the Eastern District of Louisiana and the U.S. Court of Appeals for the Fifth Circuit correctly analyzed the undisputed facts offered below and found that the Neptune Spar was as a matter of law a work platform, not a vessel, based upon this Court's prior decisions defining and elaborating on the term "vessel." Simply put, this Court in *Cope* held that the mere fact an object floats does not make it a vessel for purposes of maritime law or the Jones Act. Moreover, this Court

has held that any analysis of vessel status must look to the purpose for which the craft was constructed and the business in which it was engaged at the pertinent time. The undisputed facts below proved that the purpose of the Neptune Spar and the business in which it was engaged was that of a work platform and not a vessel.

ARGUMENT III

Removal to the U.S. District Court for the Eastern District of Louisiana from Louisiana state court was proper.

Petitioner also argues that the courts below should have remanded this case to state court pursuant to the "savings to suitors clause." 28 U.S.C. §1333(l). While petitioner is correct that suits brought under the savings to suitors clause and the Jones Act are not generally removable, this Court has long held that where the allegations contained in a state court complaint are made in an attempt to evade removal, a federal district court may review the pleadings and evidence to determine if the case if removable and should not be remanded to state court. *Great Northern Ry. Co. v. Alexander*, 246 U.S. 276, 38 S.Ct. 237, 62 L.Ed. 713 (1918); *Chesapeake & 0. R. Co. v. Cockrell*, 232 U.S. 146, 34 S.Ct. 278, 58 L.Ed. 544 (1914). Moreover, the appellate courts have long interpreted the above cases to permit district courts to look beyond the plaintiffs pleadings in order to determine whether an allegation is baseless in law and in fact and "serves only to frustrate federal jurisdiction." *Dodd*, 329 F.2d at 85; *Boyle*, 42 F.2d at 634; *Burchett*, 48 F.3d at 175-76. It is likewise well established that a district court should not pre-try a case to determine removal jurisdiction and must resolve all ambiguities in the law and disputed questions of fact in the plaintiff's favor. *Burchett*, 48 F.3d at

176. Nonetheless, a district court may equally deny remand when it "determine[s] that as a matter of law there was no reasonable basis for predicting that the plaintiff might establish liability." *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 551 (5th Cir. 1981).

In the present case, both the courts below found that there were no disputed questions of fact which precluded a finding as a matter of law that the Neptune Spar was a platform and therefore plaintiff was not a Jones Act seaman. Moreover, both the courts correctly concluded that there was no ambiguity in the current controlling substantive law which in any way would inure in petitioner's favor as the law on vessel status is well established and the facts of the present case proved that the Neptune Spar was a work platform and not a vessel. As such, the courts below properly exercised their jurisdiction to analysis plaintiff's allegations of Jones Act seaman status and correctly held that there was no reasonable basis upon which petitioner could establish liability under the Jones Act. Therefore, removal and refusal to remand the case were proper.

CONCLUSION

The district and appellate courts properly considered petitioner's claims and properly granted respondent's Motion for Summary Judgment. The petitioner, Herman Fields, is not legally a Jones Act seaman as he was not injured aboard a vessel as a matter of law. The courts below properly exercised their discretion in retaining jurisdiction over this claim and finding that the Neptune Spar was a work platform, not a vessel, and that petitioner did not qualify for Jones Act seaman status. Accordingly, this Court should decline to exercise its discretion under the present facts and prior proceedings.

Respectfully submitted,

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